

Review

Lawyers Watching China

Leon Lipson[†]

Contemporary Chinese Law: Research Problems and Perspectives. Edited by Jerome Alan Cohen. Cambridge, Massachusetts, Harvard University Press, 1970. Pp. 380. \$13.50.

Unless it is coordinated by stern editorial control, a collection of essays on research problems and perspectives tends to spread itself out along a spectrum. Some of the essays will exhibit methods of research rather than discuss them; some will present substantive conclusions, free of the documentation with which an openly substantive paper might have had to be encumbered; some will ascend from substance and method to the high dry ground of methodology. Still others may contain little more than inventories of the tools of research. When the unifying topic is the law of a far-off land with an immense early literature and difficult literacy, there is the additional opportunity of dwelling on problems of translation and the relationship between policy and language.

So it is with this collection.¹ Of the fourteen contributions, four are mainly or partly bibliographical,² devoted respectively to work published on Chinese law in China, Japan, the Soviet Union, and the United States or Western Europe. Three are centered on the language of individual legal terms: one on Japanese influences, one on Communist China's criminal law, one on Chinese terms in international law.³ Two are devoted to problems of interviewing refugees.⁴ One, though offered as a discussion of a problem in translation, amounts to a careful case study of a substantive problem in marriage law and

[†] William K. Townsend Professor of Law, Yale University.

1. CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES (J. Cohen ed. 1970) [hereinafter cited to page number only].

2. By Tao-tai Hsia, Yasuhei Taniguchi, George Ginsburgs, and Jerome Cohen (introduction).

3. Respectively by Dan Fenno Henderson, David Finkelstein and Hungdah Chiu.

4. By Jerome Cohen and Victor Li. One would have welcomed some cross-commentary by each on the other's experiences.

governmental policy.⁵ Four show us views of Chinese law from different outside "perspectives": Chinese and United States attitudes to criminal law and to international law, attitudes of Japanese writers to Chinese law, and Soviet attitudes to Chinese law.⁶ Another considers Chinese Communist civil law against a background of certain ideas in legal and social-science theory.⁷

One who seeks from this volume an idea of the way Chinese law works—the modes of thought, the style of official behavior, the sources and resources (except in the bibliographical sense)—will not find much to the point, though several of the authors have had their say on this subject in other publications. Jerome Cohen makes one relevant comment to the effect that the Uniting for Peace resolution, put through the United Nations General Assembly in 1950, was "a significant departure from the original understanding of the United Nations Charter and one which could not square with the PRC's [People's Republic of China] fundamentalist principles of constitutional interpretation."⁸ One would have liked to see some other evidence of those fundamentalist principles, even after setting to one side the substantive question of international constitutional law. If Chinese principles of constitutional interpretation are indeed fundamentalist, they offer a sharp contrast with the celebrated intricacy of many of the wriggles in the Sino-Soviet polemic, with the Communist Chinese position on the old treaties defining the Sino-Indian borders, and with the *astuce* deployed by Communist Chinese leaders in the public parts of their internal factional arguments.

Richard M. Pfeffer's essay on crime and punishment shows an endeavor to weld Franz Schurmann on organizations/ideology/politics with Lon L. Fuller on criteria of legality. Pfeffer is right, I think, when he suggests (or so I read him) that from the existence of regularity one may infer the existence not of a just system but just of a system. He appears, however, to believe that he has accomplished more: that is, that he has called into question the applicability of a description of

5. By Marinus J. Meijer. Two of the essays give contrasting glimpses of official morality of the People's Republic of China: Meijer's, on state interference with marriage (pp. 226-29), and Finkelstein's, on legal terms referring to procedural safeguards (pp. 192-93). One cannot tell whether the relative delicacy of the first is due to differences in subject matter, time, or the eye of the beholder. For a rather different comparison, consider the resemblance between the Chinese Communist attitude to sanctions for failure to register a marriage (Meijer, 228-29) and to the enforcement of commercial contracts in the event of non-performance (Lubman, p. 255). One wonders how they stand on breach-of-promise actions.

6. By Richard Pfeffer (criminal), Jerome Cohen (international), Yasuhei Taniguchi (Japanese), Harold Berman (Soviet).

7. By Stanley Lubman.

8. P. 288.

Chinese criminal process which it is clear he believes is not the whole or only truth.⁹ On the one hand, he furnishes neither sub- nor instantiation. Perhaps that is to be explained by the character of the book as a home for essays on, not of, research. On the other hand, perhaps he means that we ought to understand terms like "*ad hoc*," "administrative rather than judicial institutions," "heavily inquisitorial, generally *ex parte*," "no independent judiciary," and "dominated by the police, under strong Party control," with more or fewer connotations than a lay reader would first bring to the reading of the initial description.

Pfeffer returns to the problem of perspective after a critical excursus (*via* those uneasy mates, Packer and Skolnick) into myths and realities in the American criminal process. It says something (though it is not Pfeffer who says it) about the criminal process in the two societies that Pfeffer furnishes fewer factual citations to the Chinese material than to the American material; his mirror has more detail than his window does. (When you can't be positive and refuse to be superlative, then go comparative?)

Cohen's essay on Chinese and American attitudes to international law has more color and shows more energy than most of the other (including his other) contributions to the volume. He shares with Pfeffer the "reflectiveness" of a plea for perspective, trying to take the American reader out of his American skin for long enough to imagine how it might feel to wear another one. The reflection is tinged with strong hostility to Chiang, the Kuomintang, and the Republic of China. Cohen's intention seems to have been partly to point out similarities between Communist and KMT behavior, but also partly to suggest that Americans, having backed a horse that deserved to lose, deserved to suffer the consequences of their error.

Several of the contributions touch on the relationship between Soviet law and the law of the PRC. Different sides of that relationship face still other questions, many of which have considerable political

9. P. 261:

Laws in China not infrequently are applied retroactively and analogically or, to put it most crudely, on an *ad hoc* basis. Application of what we would classify as criminal law, especially of the law of minor crimes, tends to be by administrative rather than judicial institutions. Even where nominally judicial institutions are employed, as is the case with major crimes, their style is heavily inquisitorial, generally *ex parte*, with little opportunity for the defendant to defend himself either directly or through a lawyer. The proceedings of these institutions are not public. There is no independent judiciary and little separation of powers. The entire criminal process in China today tends to be dominated by the police, under strong Party control.

and historical interest. For example, Professor Taniguchi's study of Japanese studies of Chinese law suggests that in the past twenty years Chinese Communist law has been regarded in Japan predominantly from a (or some) Marxist point of view: whatever the PRC was doing at the time of writing was not so much analyzed as celebrated. The record seems both to illustrate the tendentiousness of much Marxist scholarship and to take its place in the long and complex history of mutual Sino-Japanese influence in politics and culture. (A companion-piece might be written on the way in which American jurists (the practitioners more than the scholars) wrote about Soviet law between, say, 1950 and 1970. The Japanese Marxist seems to have been determined to praise whatever he found in Communist Chinese law; perhaps some Americans were resolved, in similar superiority to the facts, to praise or to blame as their political convictions impelled them.)

Now, as Taniguchi observes, Japanese study of *Soviet* law is beginning to take on more varied nuances; this would appear to have something to do not just with growing familiarity, but also and even more with the split in Japanese Marxism reflecting the Sino-Soviet split. Taniguchi speculates that the "new trend . . . may eventually be duplicated in the field of Chinese law."¹⁰

When we turn to material on Soviet studies of Communist Chinese law, we see a change taking place again in conformity with political currents. Harold Berman calls our attention to Soviet studies of China in the 1950's, when Big Brother patronized and advised. One misses, however, discussion of a possibility no less plausible and no harder to document than some of the conjectures Berman does convey. He notes that, when Soviet legal writers wrote on Chinese developments in the 1950's and early 1960's (that is, between the Communist victory on the mainland of China and the start of the open Sino-Soviet polemic), they may have had in mind the adoption or adaptation of Chinese initiatives by Soviet institutions, especially in the field of supervised popular administration of justice (the non-courts).¹¹ What he does not mention is the likelihood that at least some of the Soviet writing on China has been intended not as a discussion of Soviet borrowing from China but as an indirect polemic aimed at various indigenous trends in Soviet law. Thus when a Soviet writer criticizes Chinese work on the presumption of innocence, he may intend to make obliquely points that he cannot make directly in the Soviet controversy on the *Soviet* pre-

10. P. 311.

11. P. 320.

sumption of innocence.¹² During a period of agitation, however restrained and masked, for reform in the Soviet Union, Soviet criticism of Chinese law could well have been read, and written, as being turned inward. It was not, after all, considered a very abstruse cypher when Party political writers in the Soviet Union abused "Albania" but meant China and their opposite numbers in China abused "Yugoslavia" but meant the Soviet Union.

Outside the camps of committed Marxists whose intellectual superstructures are only as firm as their political bases, a difference of emphasis has arisen between observers of China and observers of the Soviet Union, in odd parallel to the differences that have arisen between the leaders of those states and parties. Russia-watchers have tended, like Soviet writers in the mid-1950's, to see Chinese events as following or deviating from a path trodden first by the Soviet Union; unlike Soviet writers, they were free to disapprove of the Soviet direction and to approve or disapprove of the direction taken by the Communist Chinese, but they often tend to argue from the Soviet Union's chronological priority and military-industrial primacy to a secondary status for China. Sinologues, heroically sustaining the weight of Chinese tradition, culture, and history, and impressed at least adequately by the need to amortize the investment they have made in learning Chinese, tend rather to belittle the paradigmatic force of Soviet experience for a country so exceptional as the Middle Kingdom. When some new institution is developed, or an old one is discarded, in the administration of Chinese law, the Sovietologists score it by reflecting on a Marxist doctrine (however altered since Marx) or a Soviet precedent; the Sinologues score it by reference to the crowded storehouse of Chinese civilization. Some communication across the specialties, of which this book affords a welcome partial example (particularly in the essays of Berman and Ginsburgs), has complicated the pattern. Since the start of the Proletarian Cultural Revolution in the mid-sixties, affected by refugees' accounts and perhaps also by the drought of documentary flow, some China-watchers have commented on Communist Chinese law or at least justice in terms that, often

12. Berman notes Soviet "attention" to Chinese criticism of the presumption of innocence in his paragraph on the impatience and condescension shown as early as 1957 by Soviet writing on Chinese law. Yet the explicit statement of the presumption of innocence was, after long debate, *rejected* in the 1958-59 revision of the fundamentals of Soviet criminal law. Some Soviet authors have contended that equivalent protection is afforded by certain other provisions taken together, and by the general practice of Soviet organs of justice. See Stephen M. Weiner, *Socialist Legality on Trial*, in *IN QUEST OF JUSTICE: PROTEST AND DISSENT IN THE SOVIET UNION TODAY* 39, 43-44 (A. Brumberg ed. 1970).

expressly, evoke Soviet law or justice of some earlier period. Two things should be noted: first, the parallel may be rightly drawn though causal influence is belittled; second, for the sake of sharpening the contrast drawn between China today and Russia today, the magnitude of change between Soviet law in the fifties and Soviet law today may be overstated.

A few of the contributors, notably Cohen and Lubman, hint at the connection between law and domestic politics. The Lubman essay offers an attempt to relate this familiar insight to the civil law in some detail. The trouble is that with sufficient ingenuity a case can be made out for a political link if not a political cause for most legal events. In this exercise the Western analyst of Chinese Communist, as of Soviet, legal events has two advantages over analysts of looser politics: in the first place he does not need so much ingenuity, and in the second he has less information about *non*-political factors. This may be true also of the Marxian singers of Chinese Communist law noted in Japan by Professor Taniguchi, despite the centuries of Japanese familiarity with many sides of Chinese culture.

One who writes about language throws stones from in front of his glass house. David Finkelstein includes, among several examples of "inconsistent and imprecisely used terminology" in which he says Chinese legal material abounds, the following:

The words 'and' and 'or' are used in the language of Chinese law as they are in the language of American law—indiscriminately and interchangeably. In a discussion of mental illness, for instance, one author writes: 'The person who has the capacity to assume responsibility [for his acts] is a person who has the capacity to understand the nature of *and* to control his own acts [emphasis added].' In other words, for a person to have that 'capacity' he must have both elements, understanding and control. Yet the same author then goes on to say that if a person 'was unable to understand the nature of *and* control his own act [emphasis added], he should not be held responsible. Obviously, the latter 'and' must be interpreted to mean 'or.'¹³

Finkelstein's obvious correction proceeds from his obvious misunderstanding. The Chinese author's first statement maintains, as Finkelstein says, that responsibility requires both capacity to under-

13. P. 199 (underlining and bracketed matter are Finkelstein's). Despite this lapse, Finkelstein's essay deserves praise for a more analytical approach to the problems of terminology than is shown in the sure- but flat-footed chapters contributed by Chiu and Henderson.

stand and capacity to control. The second statement maintains, as Finkelstein does not say, that one who could not satisfy both requirements should not be held responsible. Whether or not that is good law or good psychology, it is not bad logic or bad English, and if Finkelstein's translation is accurate it was not bad Chinese. Finkelstein must have taken "was unable to understand the nature of and control his own act" as if it had read "was unable to understand the nature of, and was unable to control, his own act." But there is a difference between (1) "unable to do A and do B" and (2) "unable to do A and unable to do B." If (2) holds in a given case, then (1) does; but (1) may hold even when (2) does not; *e.g.*, when an actor is able to do A but is unable to do B. Finkelstein's "obvious" interpretation, resting on a wrong reading of (1) as equivalent to (2), leads him to substitute for (1) a form (3), "unable to do A or do B," which would for the first time import the very ambiguity he seeks to help the Chinese author to avoid.

Since the export and perhaps the production of primary or secondary legal texts in the PRC has been so scant in recent years, legal scholars resting upon traditional sources, whether or not applying traditional methods to them, have been starved for material. Their plight recalls the description given of a certain Latin American country a few years ago by a student in a seminar on legal problems of development: he said the country had a one-commodity economy that was running out of its one commodity. A similar fate may be averted soon for the analyst of technical Chinese law by the advent of new, though limited, possibilities for contact and observation, though awkward and difficult. The methods and perspectives discussed in this book will be supplemented, but will not be out-dated.